

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-89 (20)S
Sales Tax
July 17, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890309A

On March 9, 1989 a Petition for Advisory Opinion was received from Peter Vadnai, 180 Valley Road, Katonah, N.Y. 10536.

The issue raised is whether "reimbursable" expenses incurred by Petitioner in the performance of photographic assignments and billed separately to clients are subject to sales tax in those instances where Petitioner pays sales tax when such expenses are incurred?

Petitioner, a freelance photographer, enters into oral agreements with clients to perform photographic assignments for such clients. Petitioner contends that expenses incurred during the performance of the photography assignments are incurred in behalf of and reimbursed by the clients. The expenses incurred result from expenditures for food and lodging, air fares, ground transportation, film and processing, equipment rental, etc.

Petitioner arranges for and "pays out" the money for all expense purchases required to complete an assignment. Petitioner pays all sales tax due when making such purchases. Petitioner contends that reimbursement of incurred expenses occurs when clients make payment of the amounts billed, and that by such reimbursed expenses being considered part of the total receipts subject to sales tax, double taxation occurs.

Petitioner also contends that the clients do not own the photographs resulting from the photography assignments but merely have the right to use the photograph one time for a use specified in advance.

Section 1101(b)(3) of the Tax Law defines "receipt" as the amount of the sale price of any property and the charge for any service taxable under Articles 28 and 29, without any deduction for expenses.

Section 526.5 of the New York State Sales and Use Tax Regulations states as follows:

Receipt. [Tax Law §1101 (b)(3)] (a) Definition. The word receipt means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise, The following subdivisions of this section discuss elements of a receipt.

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(e) Expenses. All expenses including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Example 1: A photographer contracts with a customer to furnish photographs at \$50.00 each in addition to expenses.

The customer is billed as follows:

| | |
|-----------------|----------|
| Photographs (2) | \$100 |
| Model Fees | 60 |
| Meals | 10 |
| Travel | 25 |
| Props (Flowers) | <u>5</u> |
| Total Due | \$200 |

Receipt subject to tax is \$200

Section 1105(a) of the Tax Law imposes sales tax on "The receipts from every retail sale of tangible personal property"

Accordingly, the portion of receipts billed by Petitioner as expenses, whether or not "reimbursable", which are incurred in the performance of photographic assignments cannot be excluded from the total receipts subject to tax. The entire billing, including any "reimbursable" expenses incurred by Petitioner, is considered to be the sales price paid by Petitioner's clients for the finished photographs resulting from such photographic assignments and therefore is subject to the sales tax imposed under Section 1105(a) of the Tax Law.

It is noted that Petitioner's contention that the client's do not own the photographs resulting from photography assignments but merely have the right to use the photographs one time for the use specified in advance infers that Petitioner has granted the clients "a right to reproduce".

Pursuant to 20 NYCRR 526.7 (f) (1) and (2), the granting of a right to reproduce is not a license to use or a sale and is not taxable. Mere temporary possession or custody for the purpose of making a reproduction is not deemed to be a transfer of possession which would convert the reproduction right to a license to use. (Matter of Frissell v. McGoldrick, 300 NY 370; 88 NYS 2d 896; 91 NE 2d 305 (1950).)

However, under Section 1132(c) of the Tax Law, all receipts for property of any type mentioned in Section 1105(a) of the Tax Law are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax or the customer.

Upon audit by the department, or at such other times as the department requests, the vendor or user must present all...records..., kept in a manner suitable to determine the correct amount of tax

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due, together with such documentation, summaries or schedules as the department may request... .
20 NYCRR 533.2 (a) (2).

Accordingly, Petitioner's must collect state and local sales tax on the receipts from the total charges to the client's for the sale of the photographs unless Petitioner can properly substantiate that such charges are not subject to tax because the charges were solely for the right to reproduce the photographs and the photographs were returned to the Petitioner after reproduction.

DATED: July 17, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.